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being able to reflect on it. It is, however, a subject incapable of accepting its own limits, its materiality and historicity, its immersion in socio-economic and political values. The subject is conceived as disembodied, rational sexually indifferent subject – a mind unlocated in space, time or constitutive interrelations with others; a status normally only attributed to angels![28]

4. The commitment to a fixed, static truth, an immutable, given reality, a guaranteed knowledge of Being and access to Reason. Such an ahistorical view cannot account for the variability and historical nature of what counts as true except in terms of a greater and greater access to and knowledge of the truth, that is, except in terms of historical views being false views. It refuses to endorse the possibility of a 'politics of truth', of the political investments in truth. Truth, as a correspondence or veridical reflection of reality, is a perspectiveless knowledge, a knowledge without a point of view – or, what amounts to the same thing, a truth claiming a universal perspective.
5. The commitment to the intertranslatability of concepts, terms, truths, propositions and discourses. As embodied in a prepositional form, knowledge 'is not regarded as dependent on its particular modes of formulation', but on the underlying thoughts it is presumed to express. Language is considered a vehicle for the communication of pre-existent thoughts or ideas. It is seen merely as a medium, a dispensable tool for the transmission of thought, rather than being seen as thought's necessary condition. In denying the materiality of language, prevailing discourses can avoid recognising their dependence on and debt to tropes, figures of speech, images, metaphors etc. evoking the feminine, women or maternity. Patriarchal discourses ignore the complicity of discursive systems with oppressive social structures, and the dependence of discourses on particular positions established by particular modes of language.

There are, of course, many positive features that can be briefly sketched out in general ways which do not pre-empt women's various attempts at self-determination. Included among them are:

1. Intellectual commitments, not to truth, objectivity and neutrality, but to theoretical positions openly acknowledged as observer and context-specific. Rather than deny its spatio-temporal conditions and limits, feminist theory accepts and affirms them, for they are its *raison d'etre*. Following Nietzsche, it seems prepared to avow its own perspectivism, its specific position of enunciation, its being written from a particular point of view, with specific aims and goals.
2. In acknowledging its conditions of production, feminist theory seems prepared to question the value of the criteria of objectivity and scientificity so rigidly and imperialistically accepted by intellectual orthodoxies. This is not, however, an admission of any 'subjective bias'. The very distinction between objective (knowledge) and subjective (opinion) is put into question. Feminists seem prepared to accept that the knower always occupies a position, spatially, temporally, sexually and politically. This is a corollary of its perspectivism. It is neither subjective nor objective, neither absolute nor relative. These alternatives, for one thing, cannot explain the productive investments of power in the production of knowledges. This does not, however, mean that feminist theory used no criteria of evaluation or self-

28 *cf* Luce Irigaray, *L'Ethique de la Différence Sexuelle* (Paris: Minuit).

reflection. Rather, its norms of judgment are developed from inter-subjective, shared effects and functions; and in terms of a discourse's intertexual functions, its capacity to either undermine or affirm various dominant systems and structures.

3. Instead of presuming a space or gulf between the rational, knowing subject and the object known, feminist theory acknowledges the contiguity between them. Prevailing views of the rational subject posit a subject artificially and arbitrarily separated from its context. This creates a distance required for its separation from the emotions, passions, bodily interferences, relations with others and the socio-political world. Feminist theory seems openly prepared to accept the constitutive interrelations of the subject, its social position and its mediated relation to the object. For feminists (in so far as they uphold such a notion) the rational subject is not free of personal, social and political interests, but is necessarily implicated in them. Theories are seen as sexualised, as occupying a position in relation to the qualities and values associated with the two sexes, or the attributes of masculinity, and femininity. But to claim a sexualisation of discourses and knowledges is not to equate the discourse's position with that of its author or producer; there is no (direct) correspondence between feminine or feminist texts and female authors, or between phallocentric texts and male authors. The sexual 'position of the text' can only be discerned contextually and in terms of the position which the speaking subject, (the implicit or explicit 'I' of the text), speaks from; the kind of subject (implicitly) presumed as the subject spoken to (or audience), and the kind of subject spoken about (or object). As well as the range of various subjects posited in any or all texts, the text's position also depends on the kind of relations asserted between these different subjects. In the case of feminist theory, the subject, object and audience are not dichotomously divided into mutually exclusive and mutually exhaustive categories (subject/object, knower-master/ignorant-disciple, teacher/pupil, self/other etc) but may be defined more in terms of continuities and/or differences. The speaking subject, the subject spoken to and the subject spoken about may be equated; but in any case, there is a constitutive interrelatedness presumed between all three terms. This means, for example and to take a concrete case, that men do not speak with greater objectivity about women's oppression, as some male academics recently asserted with great sincerity. Men too are necessarily implicated in and part of women's oppression. It is of course clear that their relations to such oppression must be very different from women's. In short, particular interests are served by every theoretical position and in any textual or discursive system. The politics or 'power' of the text cannot, however, be automatically read off from what the text overtly says, but, more frequently from how it says it, what is invoked, and what is thus effected. Feminist theory has the merit over prevailing discursive systems of being able not only to accept but to actively affirm its own political position(s) and aspirations, to accept that, far from being objective in the sense of 'disinterested' and 'unmotivated', it is highly motivated by the goals and strategies involved in creating an autonomy for women. Such motivation or purposiveness, however, does not invalidate feminist theory, but is its acknowledged function, its rationale.

4. Because it refuses to accept the pre-given values of truth, objectivity, universality, neutrality and an abstract reason, feminist theory – along with some contemporary male theorists is not committed to or motivated by these values. It sees itself in terms of a critical and constructive strategy. It is neither abstraction, blueprint nor handbook for action, nor a distanced form

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of reflection. These views for one thing, imply a theory outside or beyond practice. In questioning the dichotomous conceptualisation of the relation between theory and practice, feminist theory considers itself both a 'theoretical practice' – a practice at the level of theory itself, a practice bound up with yet critical of the institutional frameworks within which the production of theoretical discourses usually occurs, a practice involving writing, reading, teaching, learning, assessment and numerous other rituals and procedures; as well, it is a 'practical theory' – a theory openly seen as a part of practice, a tool or tactic playing a major part in the subversive, often dangerous assault on one particular site of the functioning of patriarchal power relations – the sphere of knowledge, which provides patriarchy with rationalisations and justifications for its ever expanding control. Feminist theory is an interweaving of strands that are simultaneously theoretical and practical. It is a site where dominant discourses, subjugated discourses, voices hitherto silenced or excluded, forms of coercion and control as well as concerted forms of resistance are able to be worked through in relation to each other. It is a threshold for the intervention of theories within concrete practices, and the restructuring of theory by the imperatives of experience and practice, a kind of hinge or doorway between the two domains. In aiming at a destruction of misogynistic theory and its fundamental assumptions and at establishing a positive influence on day-to-day and structural interactions between the sexes, it is neither a prelude to practice, nor a reflection on practice because it is already a form of practice within a specific region of patriarchy's operations.

5. Feminist theory, similarly, cannot be conceived in terms of the categories of rationality or irrationality. Since at least the 17th century, if not long before, reason has been understood in dichotomous terms, being characterised oppositionally and gaining its internal coherence only by the exclusion of its 'others' – the passions, the body, the emotions, nature, faith, materiality, dreaming, experience, perception, madness or many other terms. In questioning this binary mode of categorisation, feminists demonstrated that reason is a concept associated with the norms and values of masculinity, and its opposites, or 'others', with femininity. Feminist theory today is not simply interested in reversing the values of rational/irrational or in affirming what has been hierarchically subordinated, but more significantly, in questioning the very structure of binary categories. In short, feminist theory seeks to transform and extend the concept of reason so that instead of excluding concepts like experience, the body, history, etc, these are included within it or acknowledged as necessary for reason to function. In taking women's experiences and lives as a starting point for the development of theory, feminism attempts to develop alternatives to the rigid, hierarchical and exclusive concept of reason. It seeks a rationality not divided from experience, from oppression, from particularity or specificity; a reason, on the contrary, that includes them is a rationality not beyond or above experience but based upon it.

6. In challenging phallocentrism, feminist theory must also challenge the evasion of history and materiality so marked in theoretical traditions in the West. In conceiving of itself as a rational, private, individual activity and struggle towards truth and knowledge, a pure, intellectual activity, it must also deny its status as a historical and political product. Predominant theoretical traditions refuse to accept their dependence on the materiality of writing, on practices involved in training, producing, publishing and promoting certain methods, viewpoints and representatives, on struggles for

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authority and domination. In opposition to these prevailing theoretical ideals, feminist theory openly acknowledges its own materiality as the materiality of language (language being seen as a weapon of political struggle, domination and resistance), of desire (desire as the will to achieve certain arrangements of potentially satisfying 'objects' – the desire for an identity, a sexuality and a recognised place in culture being the most clear-cut and uncontentious among feminists) and of power (power not just as a force visible in the acts, events and processes within political and public life, but also as a series of tactical alignments between institutions, knowledges, practices involved with the control and supervision of individuals and groups); in more particular terms, the alignments of male socioeconomic domination with the forms of learning, training, knowledge, and theory.

7. In rejecting leading models of intellectual inquiry (among them, the requirements of formal logic, the structuring of concepts according to binary oppositional structures, the use of grammar and syntax for creating singular, clear, unambiguous, precise modes of articulation and many other assumed textual values), and its acceptance of the idea of its materiality as theory, feminist theory is involved in continuing explorations of and experimentation with new forms of writing, new methods of analysis, new positions of enunciation, new kinds of discourse.

No one method, form of writing, speaking position, mode of argument can act as representative, model or ideal for feminist theory. Instead of attempting to establish a new theoretical norm, feminist theory seeks a new discursive space, a space where women can write, read and think as women. This space will encourage a proliferation of voices, instead of a hierarchical structuring of them, a plurality of perspectives and interests instead of the monopoly of the one – new kinds of questions and different kinds of answer. No one form would be privileged as the truth, the correct interpretation, the right method; rather, knowledges, methods, interpretations can be judged and used according to their appropriateness to a given context, a specific strategy and particular effects.

Feminist theory is capable of locating itself historically, materially, enunciatively and politically in relation to patriarchal structures. During its development over the last 25 years it has emerged as a capacity to look at women in new, hitherto unexplored ways by refusing to reduce and explain women's specificity to terms that are inherently masculine; it has developed the ability to look at any object from the point of view of perspectives and interests of women, of understanding and going beyond phallocentrism in developing different kinds of theory and practice. This description may sound like an idealised or utopian version of what a self-conscious and politically committed, active and informed theoretical practice should involve. Perhaps. It is not yet clear how far along this utopian path feminist discourses have come. But as the essays published here testify, feminist theory is in the process of developing along these diverse trajectories. It is in the process of reassessing the theoretical heritage it needs to supersede in order to claim a future for itself. This future may initiate a new theoretical epoch, one capable of accepting the full implications of acknowledging sexual difference. Theory in the future would be seen as sexual, textual, political and historical production. Although this may threaten those who adhere to the values of phallocentrism, it may open up hitherto unimagined sites, sources and tools for theoretical exploration. An autonomous femininity may introduce, for the first time in our recorded history, the possibility of dialogue with an 'alien voice', the voice of woman.

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FEMINIST JURISPRUDENCE: ILLUSION OR REALITY?[29]

Margaret Thornton

... A feminist perspective corrodes the very essence of liberal legalism with its assumptions of universalism, equality and neutrality. Not only does it highlight the falsity of these assumptions, but a feminist analysis brings out the inner core of meaning of an act for women, it rejects the high level of abstraction. Indeed, the experiential dimension may be all important.[30]

A feminist approach to law must also challenge the hegemonic, sex-based structures of capitalist formation. The fragility of recent feminist gains must alert us to be ever watchful, for it is a function of legalism to constrain and hedge in the political gains of women in order to protect and maintain the *status quo*.

Feminism, therefore, seeks to create a new vision of the world from the perspective of women: it is not content to accept the male standard as an objective and universal truth which purports to encompass all. The iconoclasm of feminist critiques of the substance and form of law are necessary steps towards comprehending the role of the law in effecting the perversion of the feminine in its portrayal as a homogeneous and inferior standard. Feminist scholarship, then, aims to be 'perspective transforming'.[31]

However, is this new feminist perspective, acquired as a result of the unmasking of the mystique of law, sufficient to constitute a feminist jurisprudence? Jurisprudence is defined as 'the science or philosophy of law' and, as Judith Shkear has pointed out, analytical jurisprudence is 'solely a science of definitions':

> The major part of any work entitled 'jurisprudence' consists of demonstrations of the 'real meaning of such terms as right, duty, tort, crime, and contract'.[32]

The focus of jurisprudence, as it is presently understood, tends to be directed towards the exposition of the law as it is within narrow, positivistic parameters. There is little understanding of the study of law as an interdisciplinary, contextual and critical exercise, for it is accepted that the law in itself is a complete entity which is capable of producing 'right' answers.

The language of liberal jurisprudence reflects a society of free and equal individuals who act as independent, self-defining agents. As has been pointed out throughout this paper, the seeds of invidiousness which attach to women as inferiors and as inhabitants of the private sphere have denied us access to this society of equals. Law has underpinned and legitimised this exclusion, and liberal jurisprudence ignores the way that the ideology of law operates to isolate law from the social context in which it exists. Since this ideology serves a functional purpose, jurisprudence is likely to be just as unresponsive to feminism as it has been to challenge by other social and intellectual movements such as Marxism, Legal Realism and the contemporary Critical Legal Studies movement, all of which have been assiduous in their task of deconstructing the specific doctrines of liberal legalism. So elusive is the theoretical task of inquiry, let alone

29 Margaret Thornton, 'Feminist Jurisprudence: Illusion or Reality' (1986) 3 *Australian Journal of Law and Society* 5.

30 KA Lahey, *Until Women Themselves Have Told All there is to Tell* (1986).

31 M Strathern, 'Dislodging a World View: Challenge and Counter-Challenge in the Relationship between Feminism and Antropology' (1985) 1 *Australian Feminist Studies* 1.

32 J Shklar, *Legalism* (Harvard University Press, 1964).

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the task of transformation, that Stewart depicts the efforts of (nonfeminist) sociologists of law as producing no more than a looking glass effect:

> But through the looking glass the sociologist can glimpse the carcasses of the attempts that since the Renaissance have repeatedly been made, then one after another abandoned, to enrich jurisprudence itself with a specific study of society.[33]

Though a feminist jurisprudential telos may be recondite, there is a danger that, if feminists are too assiduous in compressing feminist scholarship into a traditional jurisprudential framework in the short term, it may lose its critical edge. Scales' article 'Towards a Feminist Jurisprudence' would seem to be an example of this somewhat overly cautious approach.[34] Scales does not set out to postulate a theory of law, as she herself acknowledges, but to demonstrate 'the necessity of making a feminist evaluation of our jurisprudence and of taking a jurisprudential view of feminism'. While she recognises the fallacy inherent in the liberal vision, that is, the maleness of the norm of equality, her analysis focuses on the sex-unique problems arising from pregnancy and breast feeding, as revealed in a number of American Supreme Court cases. Dismissing both the liberal view and the assimilationist view which seeks to minimise sexual difference, Scales proposes her own 'incorporationist' approach which would recognise women's uniqueness in respect of female sex specificity.

It would seem, however, that a focus on reproductive differences alone is too limited to constitute a 'feminist jurisprudence' because it does no more than reaffirm women's association with nature and nurture, although it is recognised that it could have the potential to expose the law to the politics of reproduction, a fundamental area of human endeavour hitherto invisible. The conflation of women and reproduction is nevertheless overly restrictive, because it suggests a nonexistent homogeneity amongst women. Indeed, the Scales' model does not appear to be visibly different from conventional liberal jurisprudence which is able to accommodate sex-based differential treatment in cases where to do otherwise might be conceptualised as irrational, an asseveration which is ultimately damaging to the rule of law.

A transformative vision requires not just that women be 'let in' to existing male society with a perspective on 'women's issues', but that the entire gamut of human jurisprudence be reappraised to take cognisance of the feminine. The focus on reproductive differences alone has the effect of perennially confining women to the margin and otherwise accepting the continued irrelevance of women to public sphere concerns. The meretricious claim to universalism of the prevailing androcentrism would consequently remain unchallenged.

Feminist legal scholarship, in common with the feminist project generally, has the twin aims of challenging the existing norms and of devising a new agenda for theory:

> In other words, today's feminist theory is involved in both an anti-sexist project, which involves challenging and deconstructing phallocentric discourses; and in a positive project of constructing and developing alternative models, methods, procedures, discourses, etc.[35]

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33 I Stewart, 'Sociology in Jurisprudence: The Problem of Law as Object of Knowledge', in B Fryer (ed), *Law, State and Society* (Croom Helm, 1981).

34 AC Scales, 'Towards a Feminist Jurisprudence' (1981) 56 *Indiana LJ* 375 (extracted in Chapter 4).

35 Elizabeth Grosz, *op cit* (extracted above).

Given the fact, however, that women have been entirely excluded from a legal tradition which spans several millennia, it is ingenuous to imagine that a fully fledged feminist jurisprudence is likely to spring forth from the feminist movement instantaneously. Such naivety also fails to acknowledge that the impenetrability of the carapace of autonomy which envelopes the law and immunises it against challenge is such that a transformed gynocentric jurisprudence must necessarily remain elusive – at least for the time being.

EVOLUTION AND FLUX IN FEMINIST JURISPRUDENCE

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The feminist legal movement at first centred on the specific detailed areas of legal discrimination against women. For example, writers such as Albie Sachs and Joan Hoff Wilson provided an early comparative analysis of the legal position of women in the United Kingdom and in the United States of America.[36] Susan Atkins and Brenda Hoggett concentrated upon the idea of legal equality – or inequality – in employment law, in relation to the role of women within the traditional family and the position of women under the Welfare State and in relation to citizenship.[37] Katherine O'Donovan analysed the liberal dichotomy of society into 'public' and 'private' spheres and examined the problem of the legal position of women in relation to the family,[38] and subsequently, in conjunction with Erika Szyszczac analysed the notion of legal equality in employment law and practice.[39] Carol Smart has also analysed the legal position of women under English family law.[40] By concentrating on specific areas of the law, the writers of this phase of legal feminism unmasked the myth of law's gender neutrality and simultaneously pressed the case for legal equality. The task is not yet finished. In *Law and the Sexes*, Ngaire Naffine explains the concerns of this 'first phase feminism'.

LAW AND THE SEXES[41]

Ngaire Naffine[42]

The largest body of feminist work on law is about the pursuit of formal equality for women: from the acquisition of citizenship to the introduction of anti-discrimination legislation. It describes a male monopoly in the public sphere which a male controlled law has supported systematically. Its goal has been the removal of legal constraints on women to compete freely with men in the marketplace.

36 Albie Sachs and Joan Hoff Wilson, *Sexism and The Law: A Study of Male Beliefs and Judicial Bias* (Martin Robertson, 1978).

37 Susan Atkins and Brenda Hoggett, *Women and The Law* (Blackwell, 1984).

38 Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson, 1985).

39 Erika Szyszczac, *Equality and Sex Discrimination Law* (Blackwell, 1988).

40 Carol Smart, *The Ties That Bind* (Routledge & Kegan Paul, 1984).

41 Ngaire Naffine, *Law and the Sexes* (Allen and Unwin, 1990).

42 At the time of writing, Research Fellow, University of Adelaide and Visiting Scholar, Australian National University.

> This first phase of writing contends that legal men have used their position of dominance to keep the public sphere a male preserve.[43] In the courts and in the parliaments, men have actively sought to exclude women from positions of influence. the aim of feminists is thus to have women placed fully on the legal agenda, to have full rights extended to women.
>
> A distinguishing feature of the first phase is its tendency to accept, and approve, law's own account of itself when it is not dealing with women. Law is seen therefore to be essentially a rational and fair institution concerned with the arbitration of conflicting rights between citizens. The problem with law is that it has not yet developed full and effective public rights for women. It was once overtly discriminatory. Today it indirectly denies women rights by constituting a subordinate, domestic role for them in the private sphere.
>
> In the first-phase analysis, the present character and outlook of law is largely left intact. They prevailing idea is accepted that law should be (and can be) impartial and reasoned. The objection is to the failure of law to adhere to its own professed standards when it invokes discriminatory laws and practices. That is, the objection is to bad law.[44]

Ngaire Naffine evaluates the work of first phase feminism as follows:

> Notwithstanding subsequent developments in feminist legal thinking which (as we will see) have greatly extended the challenge of the first-phase theorists, it would be wrong to see this early work as fatally flawed by the limitations of its vision, as too short-sighted in its focus on the male personnel of law. The contribution of the first phase to women's struggle for legal change has been considerable. Not only does it represent the first feminist excavation into the male foundations of law, the first archaeological dig, but its challenge to male dominance of legal institutions and to discriminatory legislation has been instrumental in reshaping and reforming much of the law for women. Indeed one writer [Susan Moller Okin] goes so far as to say that it represents 'the single most important feminist legal strategy ... the theoretical underpinning of the entire women's rights movement in law'. By demonstrating how laws which constrain only one of the sexes, and seem to work for the benefit of the other, fail to meet the law's own self-professed standards (of fairness, rationality and impartiality), it has indicted law on its own terms and supplied the intellectual framework for women's demands for equal treatment. Its sustained attack on legal sexism have also come close to winning for women formal equality within the substantive law.[45, 46]

The feminist legal movement has developed further from the specific task of unmasking the reality of law as gendered and unequal, although much remains to be achieved in that regard. In 'second phase feminism' the idea that law is gender-neutral, essentially good but in need of realignment to accommodate women's claims to equality under law, is rejected. Feminism has moved on to look at 'law' in the abstract, and considering its essential characteristics. The concern here is less with individual substantive rules of law and their justice or

43 On the public/private dichotomy see Chapter 5

44 Ngaire Naffine, *op cit*, pp 3–4.

45 *Ibid*, p 6.

46 See also K O'Donovan, 'Fem-Legal and Socio-Legal: An Incompatible Relationship', in P Thomas (ed), *Reviewing Socio-Legal Studies* (Dartmouth, 1996).

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otherwise in relation to women, but rather with law in its entirety. Ngaire Naffine explains:

LAW AND THE SEXES[47]

Ngaire Naffine

> The second-phase feminists are more swingeing in their critique of law's claim to impartiality and justice for all. These are merely high-minded principles which legal men have employed as protective cover. They obscure law's actual partiality: its preference for men and their view of the world. The truth is that men have fashioned a legal system in their own image. They have developed a harsh, uncaring, combative, adversarial style of justice which essentially reflects their own way of doing things and therefore quite naturally advantages the male litigant. Law treats people as unfeeling automatons, as selfish individuals who care only for their own rights and who feel constantly under threat from other equally self-absorbed holders of rights. This is a male view of society, they say, which ignores and devalues the priorities of women – those of human interdependence, human compassion and human need.
>
> Second-phase feminists also take issue with law's conception of its own objectivity. This is a highly suspect notion, they say, not just because it has been used as a smoke screen to conceal male bias but because it invokes a particular approach to a social world with which many feminists take issue. Law's objectivity, they say, seeks to invoke a detached, dispassionate approach to social conflict. In the rhetoric of law, impartiality is secured by the maintenance of a healthy distance between the 'fact-finder' and the subjects of the dispute. This is the means by which judges maintain their closely guarded neutrality and hence their objectivity. To second-phase feminists, detachment may not be the best approach to resolving disputes: involvement and close proximity to the subject may be better ... .[48]
>
> The proposition that law is imbued with the culture of men moves beyond the claim that law is made by men and therefore tends to entrench their position of dominance. The indictment is more far-reaching. Law, it is said, is conceived through the male eye; it represents the male perspective. It starts from the male experience and fails to recognise the female view ... .
>
> There is little point in seeking to improve women's position within this masculine legal framework: it has no room for women. What is needed is social revolution, not reform.[49]

From the radicalism of this second phase, feminist scholars have moved into the inquiry concerning the relevance of law to a patriarchal society. Postmodernism, characterised by its rejection of all-encompassing ground theory and the admission of doubt, uncertainty and fragmentation has exerted a heavy influence on recent feminist jurisprudential thought. Ngaire Naffine explains:

> Third-phase feminist theory concedes that law is both male-dominated and full of biases, one of which pertains to the sex of the litigant. However, it resists the

47 Ngaire Naffine, *op cit*.

48 *Ibid*, p 7.

49 *Ibid*, pp 7–8.

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> notion that law represents male interests in anything like a coordinated or uniform fashion. The reason is that law is not the coherent, logical, internally consistent and rational body of doctrine it professes to be. Part of the feminist challenge here is to the very concepts law has employed to represent itself as a fair and impartial institution. Law, they say, is not to be regarded – as it has traditionally – as a neutral and dispassionate institution which accordingly resolves disputes and organises social relations justly. The various epithets conventionally used to describe law, such as 'rational', 'autonomous' and principled', are in fact male legal ideals. They describe a set of qualities to which men might aspire but they are not, and could not be, the truth of law because nothing is life is every organised in this way. Vital dimensions of human existence, dimensions conventionally associated with women, are missing from law's depiction of itself. The reality of law is that it is 'as irrational, subjective, concrete and contextualised as it is rational, objective, abstract and principled'.[50]
>
> Another concern of the third-phase feminists is to show that while law presents itself as autonomous and value-neutral, the truth is that law reflects the priorities of the dominant patriarchal social order, priorities which are themselves not always coherent or consistent but which generally constitute women as the subordinate sex. Also central to third-phase feminism is an explicit rejection of grand theory and a commitment to the study of particular instances of law's oppression of women.

Theorising about law and society has thus taken centre stage. Building upon the empirical data without which no such movement would have been possible, feminist jurists nowadays are seeking to synthesise the work, to place it within theoretical context and to explore feminist jurisprudence both as a discrete discipline, and as an alternative to traditional jurisprudence. Parallels may here be drawn with the evolution of sociological jurisprudence. Traditional jurisprudence has seen a similar evolution. From an analysis of laws and legal systems, and the systematisation of legal thought through legal positivism, attention turned to the exploration of the role of law in society and the interconnectedness and interdependence of law and society. The sociology of law movement explored law as a phenomenon employing the techniques of sociological empirical research. Contemporaneously, jurists were theorising about their own discipline – seeking to understand the role of law, the significance or otherwise of law as an instrument, the potential for law as a means of social change, and sociological jurisprudence occupies a central place in late 20th century thinking about law from a theoretical perspective.

Carol Smart has also critically assessed the need for – and desirability of – considering the position of women from a broader conceptual standpoint.[51] Smart cautions also against an overemphasis on law as a mechanism through which an advance in the position of women in society will be achieved – arguing that we should take care not to overestimate the power of law. It is a natural, but not necessarily desirable, assumption on the part of lawyers that law alone can produce social change. Smart argues that law 'has an overinflated view of itself', and by concentrating on law alone, feminist legal theorists may

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50 F Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' [1984] 96 *Harvard Law Review*, p 156.

51 Carol Smart, *Feminism and the Power of Law* (Routledge and Kegal Paul, 1989).

fall into a self-limiting trap which obviates the need to view the position of women in far broader terms than law alone. Notwithstanding that caveat, the power of law to affect and determine social relations between individuals in society must be acknowledged. Whilst law is culturally dependent, and will reflect traditionally – socially/culturally – and politically determined social relationships, law possesses unique transformatory power – at least in the superficial regulation of relations in society, if not the power to alter consciousness within society.

FEMINISM AND THE POWER OF LAW[52]

Carol Smart[53]

Law's Power

The aspect of power I have focused on has been in terms of law as a discourse which is able to refute and disregard alternative discourses and to claim a special place in the definition of events. My concern has been with law as a system of knowledge rather than simply as a system of rules – although these two things are clearly related if one accepts that knowledge creates the potential to exercise power (ie through rules). In the first chapter I took issue with Foucault's formulation of the place of law (or the system of juridical rights) as a mode of regulation which is likely to diminish as disciplinary mechanisms (ie psychiatry) develop. He posits two modes of 'contrivances' of power, the 'old' form which is juridical power and the 'new' forms of discipline, surveillance, and regulational. He suggests that the old form will be gradually colonised by the new. However, whilst I accept that there are examples of this colonisation, I have also suggested that the process may work both ways and that the power of law may be enhanced by harnessing disciplinary modes to traditional legal methods by extending law into new terrains created by new techniques. The main example I provided of this was the way in which reproductive technologies have created the potential for new biological and social relationships and how this has created a new field in which law can apply its traditional tenets. I have suggested that rather than abandoning the field to the doctors and social workers or psychiatrists, law has striven to define the parameters of new relationships and that the creation of 'new' arenas has led to an extension of law into more and more intimate areas of personal life. Hence whilst medicine has the power to disorganise the patriarchal family, law has striven to ensure that it does not. The freezing of human embryos, for example, has not preoccupied the psychiatrists and social workers nearly so much as the lawyers who wish to define ownership and inheritance rights and to impose a legitimate family structure on the human tissue.

I am therefore less certain that law's traditional power is diminishing; rather there is a symbiotic relationship between the two modes (of discipline and of rights) and it cannot be presumed that law's part in this will diminish. This raises a dilemma, however, for it law's power is extending it seems to call for greater attention from feminism, not less.

De-centring Law

There have always been two components to feminism's engagement with law. One has been to resist legal changes which appear detrimental to women, the

52 *Ibid*.

53 At the time of writing, Lecturer in Sociology, University of Warwick.

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